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IN THE

Supreme Court of the United States

October Term of 1974

No. 74-338

DEREK THOMAS AKRIDGE,

Petitioner,

vs.

ANTHONY BARRES, CHIEF OF POLICE, AND THE CITY OF NEWARK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

GARRETT M. HEHER
Attorney for Petitioner
One Palmer Square
P.O. Box 1154
Princeton, New Jersey 08540

Of Counsel and on the Brief,
FRANK J. PETRINO
Smith, Stratton, Wise and Heher
One Palmer Square
P.O. Box 1154
Princeton, New Jersey 08540

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Opinions Below

The opinion of the Supreme Court of the State of New Jersey is reported at 65 N.J. 266 and 321A. 2d 230; the decision of the Appellate Division of the Superior Court of New Jersey is reported at 122 N.J. Super. 476 and 300A. 2d 866;* the decision of the Chancery Division of the Superior Court of New Jersey is reported at 118 N.J. Super. 557 and 289A. 2d 270. The opinions of the lower courts are set forth in Appendices A, B and C hereto.

* According to New Jersey practice, the opinions of appellate courts in the State are self-executing and no separate judgment is entered after the rendering of an opinion. Accordingly, the opinions set forth in Appendices A and B are the final judgments of the courts below.

Jurisdiction

The opinion of the Court below was entered on June 26, 1974.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1257(3) and 2101(c).

Questions Presented

Whether the New Jersey Supreme Court erred in failing to require the City of Newark at a hearing on the trial level to demonstrate the existence of a compelling state interest which would justify the infringement by Special Order No. 71-15 of petitioner's constitutional rights.

Whether the New Jersey Supreme Court, in holding that a police force in many respects constitutes a military organization, erred in thereby denying petitioner, as a policeman, any constitutional rights including those of free expression and personal liberty.

Whether the New Jersey Supreme Court erred in sustaining the validity of Special Order No. 71-15 as against petitioner's claims of infringement of his constitutional rights of free expression and personal liberty under *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

Constitution and Regulation Involved

The relevant provisions of the United States Constitution involved in this suit are Amendment 1, Amendment 9 and Amendment 14, Section 1. These provisions are set forth in Appendix D. The relevant regulation is Special Order No. 71-15 of the Newark Police Department promulgated on March 23, 1971. The Regulation is set forth in Appendix C [pages C-1 through C-4].

This Petition seeks review of a Judgment of the Supreme Court of the State of New Jersey, filed June 26, 1974, affirming (two justices dissenting) a Judgment of the Appellate Division of the Superior Court of New Jersey upholding the validity and constitutionality of Special Order No. 71-15.

Statement of Case

On March 23, 1971, respondent, the Newark Police Chief, adopted Special Order No. 71-15 [Appendix C] which sets the standards of appearance for hairstyles and facial hair growth worn by Newark police officers.

Petitioner Akridge, a black Newark policeman, refused to comply with the provisions of the Order insofar as they dealt with the "bushiness of his hair, the length of his sideburns and the extent of growth of his mustache," claiming that the Order infringed his constitutional rights of free expression and personal liberty and that the Order would impede his effectiveness as a policeman in working with and relating to members of the black community who predominated in the district to which he was assigned (49-51a)*

Petitioner filed a Complaint in the Chancery Division of the Superior Court of New Jersey on April 27, 1971, challenging the validity of the Special Order. 65 N.J. at 271, 321 A. 2d at 233. Preliminary relief was denied pending the completion of administrative procedures of the Newark Police Department. On May 10, 1971, plaintiff was tried before the Police Director of the City of Newark on charges of violating certain provisions of the Order. 118 N.J. Super. at 560, 289 A. 2d at 272.

* Page numbers ending in "a" refer to the transcript of the Administrative Hearing (Disciplinary Hearing) before John L. Redden, Police Director.

At the administrative hearing, the Police Director, who conducted the hearing, stipulated that petitioner Akridge's performance as a policeman was not in any way affected by his personal appearance which allegedly violated the Order (19a). Petitioner testified that he wore his hair in the manner complained of to express his pride in his race and culture and to assist him in the performance of his duties as a policeman by giving him rapport with the predominately black community in the South District to which he was assigned thereby helping him "to relate with the people that I'm serving." (49-51a). Two fellow members of the Newark Police Department testified that petitioner Akridge was aided by his appearance in his performance of his duties as a policeman in the South District and that, in their opinion, the Order was aimed solely at black police officers. (37-38a, 40-21a)

At the same hearing, a police inspector testified that the sole reason for the adoption of the Order was to achieve uniformity of appearance. (66-67a, 69-70a)

After the hearing was concluded, the Police Director found petitioner Akridge guilty of the charges, fined him five (5) days' pay and gave him the option of working off the fine period. 118 N.J. Super. at 560, 289 A. 2d at 273. Petitioner Akridge then renewed in the Chancery Division his challenge to the constitutional validity of the Order and his conviction for violating the Order pursuant to his Complaint seeking a declaration that the Order was void and enjoining and restraining the disciplinary action taken against him for violating the Order.

On March 29, 1972, the Chancery Division rendered summary judgment in favor of defendant sustaining the validity of the Order because (1) a policeman is, in many

respects, a member of a military organization and (2) a policeman has no constitutional right to be a policeman citing an 1892 decision of the Supreme Judicial Court of Massachusetts. [Appendix C]

On April 28, 1972, petitioner appealed the Chancery Division's decision to the Appellate Division. On February 23, 1973, the Appellate Division, in a *per curiam* opinion, affirmed the decision of the Chancery Division because a policeman is a member of a military organization. The Appellate Division also held that Special Order No. 71-15 did "not offend any First Amendment rights" of petitioner. 122 N.J. Super. at 478, 300 A. 2d at 867. [Appendix B]

On April 9, 1973, petitioner appealed the Appellate Division's decision to the Supreme Court of New Jersey. On June 26, 1974, the Supreme Court, in a *per curiam* opinion (two Justices dissenting), affirmed the decision of the Appellate Division "substantially for the reasons expressed by the Appellate Division". 65 N.J. at 266, 321 A. 2d at 230. [Appendix A] The two dissenting judges found that the City had not met its burden of demonstrating the "legitimate state interest" [A-2] and "genuine public need" [A-7] to sustain the regulation. One of the dissenting Justices agreed with the Second Circuit Court of Appeals' reasoning in *Dwen* v. *Barry,* 483 F. 2d 1126 (2nd Cir. 1973) that viewing a police force as a military organization is not a sufficient reason for the denial of a policeman's constitutional rights [A-3].

Petitioner has been represented at all stages in the New Jersey courts and is represented here by attorneys working for the American Civil Liberties Union.

REASONS FOR GRANTING THE WRIT

1. The decision of the New Jersey Supreme Court limits a policeman's Federal constitutional rights which have not yet been determined by this Court and conflicts with other Federal and State Court decisions.

The extent to which a municipality can regulate the appearance of its policemen and infringe their constitutional rights of free expression and personal liberty by regarding them as members of a military organization has never been determined by this Court. It is a question of importance not only for members of the Newark Police Department but for members of municipal police and fire departments across the country which have adopted similar regulations. See *generally* Dilloff, *Federal Court Litigation Over the Regulation of Adult Grooming*, 38 Albany L. Rev. 387 (1974); *Black v. Rizzo*, 360 F. Supp. 648 (E.D. Pa. 1973) (municipal fire department appearance regulation held invalid for failure to establish a state interest warranting infringement of constitutional rights).

The Second Circuit and Eighth Circuit Courts of Appeals and the Court of Appeals of the State of Oregon have been called upon to determine the validity and constitutionality of municipal police department regulations which require compliance with a certain standard of personal appearance. *Dwen v. Barry*, 483 F. 2d 1126 (2nd Cir. 1973); *Stradley v. Andersen*, 478 F. 2d 188 (8th Cir. 1973); *Burback v. Goldschmidt*, 521 P. 2d 5 (Or. App. 1974). In these cases, a different analysis was used by each court to determine the constitutional rights of police officers challenging similar appearance regulations.

In *Dwen v. Barry, supra*, the Second Circuit, reversing summary dismissal on the pleadings, held that "choice of

personal appearance is an ingredient of an individual's personal liberty" protected by the due process guarantees of the Fifth and Fourteenth Amendments, "any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation," and that the case would have to be remanded to the District Court because defendant "failed to make the slightest showing of the relationship between its regulation and the legitimate interest it sought to promote." 483 F. 2d at 1130-1131. The court implicitly rejected, however, appellant's claim that the regulation infringed upon his right of free expression under the First Amendment.

In *Stradley v. Andersen, supra,* the Eighth Circuit affirmed the trial court's decision on the merits, holding that the challenged appearance regulation "was reasonable and calculated to achieve legitimate state interests". 478 F. 2d at 189. In reaching this result, the court employed a "balancing analysis" which evaluated competing interests to determine whether the policy of the municipality to set standards of appearance for its personnel espouses a societal interest which outweighs the individual rights of a police officer to appear as he likes. Although the Eighth Circuit used a different analysis from the Second to determine the constitutionality of the regulation, the Eighth Circuit, like the Second, concluded that the right to choose personal hair style and length was protected by the Due Process Clause of the Fourteenth Amendment and that the state or municipality must demonstrate the necessity of such regulation to sustain its constitutionality.

In *Burback v. Goldschmidt, supra,* the Oregon court affirmed the denial of injunctive relief and upheld the challenged appearance regulation against appellant's Ninth Amendment and Equal Protection claims, reasoning that

the municipality had demonstrated on the record that the regulation of hair length of its policemen was reasonably connected with the accomplishment of police purposes and that appellant had failed to show that his rights had been violated. Unlike *Dwen v. Barry* and *Stradley v. Andersen*, the court intimated that if appellant had presented evidence that he desired to wear his hair long as a means of self-expression, a First Amendment issue would have been present.

The New Jersey Supreme Court refused, unlike the decisions in *Dwen v. Barry, Stradley v. Andersen* or *Burback v. Goldschmidt*, to require the City of Newark to demonstrate at a hearing on the trial level the existence of a legitimate state interest which requires this Special Order's provisions as to personal appearance. (The two dissenting Justices would have required the City to meet its burden of showing such a state interest was involved.) The Court below merely assumed a legitimate state interest existed because a policeman is a member of a military organization, citing only a municipal law treatise which itself recognizes that the supposed military nature of a police force is not a basis for eliminating a policeman's constitutional rights. 16 McQuillin, *Municipal Corporation* (3rd 1972 rev'd) §45.16, p. 662. Thus, the Court below, by compelling petitioner to be subject to military discipline, interferes with his rights of free expression and prevents him from relating to the citizens he regards himself as serving. Such a holding could be the basis for denying members of a police force many other constitutional rights in addition to the ones involved here.

In sustaining the validity of Special Order No. 71-15, the New Jersey Supreme Court tacitly denied petitioner's claim [raised in pleadings and briefs on appeal] that his choice of personal appearance is a constitutional right protected by the due process guarantees of the Constitution.

Similarly, and more significantly in terms of the dictum in *Burback v. Goldschmidt*, the New Jersey Supreme Court expressly rejected petitioner's claim that Special Order No. 71-15 offended his First Amendment rights. In rejecting this claim, the Court below mistakenly relied on the decision in *Richards v. Thurston*, 424 F. 2d 1281 (1st Cir. 1970). In *Richards v. Thurston*, the First Circuit recognized a constitutional right grounded in due process guarantees to style one's appearance although noting that the element of expression and speech involved in one's choice of hair length and style may not be "of a sufficiently communicative nature to warrant the full protection of the First Amendment." [emphasis supplied] 424 F. 2d at 1283. The Court below, however, in relying on *Richards v. Thurston* misquoted the opinion by eliminating [B-2] the word "full" [underscored above] from the quotation to support a conclusion that personal rights with respect to appearance warrant no First Amendment protection.

This Court has never considered the question of whether a police force constitutes a military organization for the purpose of determining the constitutional rights of policemen. Nor has this Court ever considered the question of the extent to which, if at all, public employers may interfere with their employees' rights as to personal appearance. The decisions of the Second Circuit Court of Appeals and the New Jersey Supreme Court, in effect, mean that police officers in New York City have constitutional rights which their brothers in nearby Newark do not. In a federal system where all citizens of similar situations are to be accorded the same constitutional rights, this Court must act to insure that a policeman's Federal constitutional rights do not depend upon geographical location.

2. The New Jersey Supreme Court failed to apply this Court's decision in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

This Court has recognized that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights." *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). Similarly, this Court has recognized that public employees do not relinquish their First Amendment rights when they accept public employment. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Wieman v. Updegraff*, 344 U.S. 183 (1952). Accord: *Battle v. Mulholland*, 439 F. 2d 321 (5th Cir. 1971); *Muller v. Conlisk*, 429 F. 2d 901 (7th Cir. 1970); *Brukiewa v. Police Commissioner of Baltimore*, 257 Md. 36, 263 A. 2d 210 (1970); *In re Gioglio*, 104 N.J. Super. 88, 248 A. 2d 570 (Middlesex County Ct. 1968). Nor do public employees forfeit their Fifth Amendment privilege against self-incrimination. *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

This is not to say that the First Amendment rights of public employees are absolute. As this Court reasoned in *Pickering v. Board of Education*, 391 U.S. 563 (1968), a public employee's First Amendment rights may be regulated if, after applying an analysis which balances the "interests" of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees' [391 U.S. at 568], it is determined that the state interest outweighs the need to protect the public employee's rights. The kind of governmental interest that must be established and which is balanced against the public employee's individual interest has been characterized as "compelling; substantial; subordinat-

ing; paramount; cogent; strong." *United States v. O'Brien,* 391 U.S. 367, 376-377 (1968), reh. den. 393 U.S. 900 (1968).

Petitioner argued below, citing *Pickering,* that Special Order No. 71-15 infringed his First Amendment rights because it interfered with the expression of his pride as a black man in his history, culture and heritage and his communication as a policeman with citizens he serves in the part of Newark to which he was assigned. Petitioner also cited two court rulings that, applying decisions of this Court, found that conduct similar to that of petitioner's in this case was entitled to First Amendment protection. *Braxton* v. *Board of Public Instruction of Duval County, Fla.,* 303 F. Supp. 958 (M.D. Fla. 1969) (dismissal of black public school teacher for refusing to shave goatee held invalid) *Finot v. Pasadena City Board of Education,* 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (held invalid transfer of public school teacher from classroom teaching assignment to home teaching for refusal to shave beard).

Nevertheless, the New Jersey Supreme Court refused to rule on petitioner's claims under *Pickering* and relied instead on a misreading of *Richards v. Thurston* to deny petitioner any First Amendments rights because supposedly a member of a military organization.

The decision of the New Jersey Supreme Court not only misapplies or refuses to apply decisions of this Court but also has the effect of relegating policemen to the status of second-class citizens insofar as their constitutional rights are concerned. *See* Note, *The Policeman: Must He Be A Second-Class Citizen With Regard To His First Amendment Rights,* 46 N.Y.U. L. Rev. 536 (1971); Note, *The First Amendment And Public Employees—An Emerging Constitional Right To Be A Policeman,* 37 George Washington L. Rev. 409 (1968).

CONCLUSION

It is respectfully submitted that for the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Garrett M. Heher
GARRETT M. HEHER
Attorney for Petitioner
DEREK THOMAS AKRIDGE

Of counsel and on the Brief
FRANK J. PETRINO
Smith, Stratton, Wise and Heher
One Palmer Square
P.O. Box 1154
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Certificate of Service

I, Garrett M. Heher, Attorney for Petitioner, DEREK THOMAS AKRIDGE, do hereby certify that on this, the 24th day of September, 1974, three copies of the foregoing Petition for a Writ of Certiorari have been served on the following:

MR. DONALD E. KING
Corporation Counsel
The City of Newark
920 Broad Street
Newark, N.J. 07102

Attorney of record for the Respondents, by mailing the same to him through the United States mail, postage prepaid.

/s/ Garrett M. Heher
GARRETT M. HEHER

APPENDIX A

Opinion and Judgment of the Supreme Court of New Jersey

DEREK THOMAS AKRIDGE AND THE BRONZE SHIELDS, INC., A CORPORATION OF THE STATE OF NEW JERSEY, PLAINTIFFS-APPELLANTS, v. ANTHONY BARRES, CHIEF OF POLICE, AND THE CITY OF NEWARK, DEFENDANTS-RESPONDENTS.

Argued May 21, 1974—Decided June 26, 1974.

PER CURIAM. The judgment is affirmed substantially for the reasons expressed by the Appellate Division.

PASHMAN, J. (dissenting). I join in the dissent filed by my colleague Mr. Justice Clifford. I must, however, make it clear that I believe there is a legitimate state interest in the appearance of our police officers. The public must be able to recognize on sight a law enforcement officer in the "uniformed" division. Indeed, the presence of a uniformed officer has been demonstrated to deter criminal activity. I am satisfied that uniformity of dress plays a significant role in the discipline of a police department.

On the other hand, hair grooming and personal appearance are different matters. In my opinion, public officials and employers, both public and private, have grossly overreacted to different hair styles. There is not a scintilla of evidence to support the position that the camp of "short hairs" possesses a superior aptitude or attitude toward their studies or a greater proficiency at their employment than do their "long hair" counterparts.

It is a gross injustice to determine the merit and character of a person by his appearance alone. Those among

us who steadfastly continue to perpetrate such nonsense are reveling in self-delusion. Their inability to cope with changing times is reflected in their intransigence in placing themselves in the position of a sole moral arbiter of what is acceptable and good and what is not.

It appears to me that many governmental superiors and employers are simply exhibiting a distaste for long hair styles and nothing more. Our differences in life-style are as distinct as our differences in religion and politics, and, therefore, we should be able to hold and express such without undue interference.

A governmental employer should bear the onus of justifying the legitimate state interest necessary to establish and sustain a regulation of this nature.

CLIFFORD, J. (dissenting).

> It is bromidic to say that times change, but perhaps this is a case where a bromide is in order. [*Bishop v. Colaw*, 450 *F.* 2d 1069, 1078 (8 Cir. 1971) (Aldrich, J. concurring)].

Special Order 71-15 of the Newark Police Department sets "Standards of Appearance" for "hair styles and facial hair growths" worn by municipal police officers.[1] The Chancery Division sustained its validity, finding the Order reasonable on its face and "well within the scope of the responsibilities given to those charged with running the Newark Police Department." 118 *N. J. Super.* 557, 564 (1972). The Appellate Division, in an opinion adopted substantially by this Court today, affirmed. The holding is that the police department, whose members are said to con-

1. The regulation is set forth in full in the opinion of the Chancery Division at 118 *N. J. Super.* 557, 558-559 (1972).

stitute "in many respects * * * a military organization," has a "proper and legitimate interest in the appearance of its members" and that a regulation governing length and style of head and facial hair "does not offend any First Amendment rights." 122 *N. J. Super.* 476, 477-478 (1973).

While I accept the notion that the appearance of police officers may very well be a legitimate matter for the concern of the Department, no legally sufficient justification for Newark's form of restriction on hair style appears in this record—a critical deficiency, in my view, for reasons expressed below. The analogy to a "military organization," resorted to by both courts below and now by the majority, I find inexact and unpersuasive. And surely the constitutional point cannot be disposed of with such easy dispatch.[2]

I would follow the approach of the court in *Dwen v. Barry,* 483 *F.* 2d 1126 (2 Cir. 1973), also a case in which a police officer sought to enjoin a hairstyle rule. The trial court there had resorted to the analogy to the military in sustaining the regulation, observing at the same time that it might well raise constitutional issues of the right to free expression, due process and equal protection if applied to

2. Judicial recognition of a constitutional right to style one's own appearance is found in the first, second, third, fourth, seventh and eighth federal circuits, although there is little agreement as to the source. Different courts have found the right in the First Amendment freedom of speech, the Ninth Amendment rights retained by the people, the equal protection clause of the Fourteenth Amendment, and the due process guarantees of the Fifth and Fourteenth Amendments. Convenient collections of the cases are found in *Dwen v. Barry,* 483 *F.* 2d 1126, 1130 (2 Cir. 1973), in *Bishop v. Colaw, supra,* at 450 *F.* 2d 1071-1075, and in *Greenwald v. Frank,* 40 *A. D.* 2d 717, 337 *N. Y. S.* 2d 225, 228-229 n. 4 (App. Div. 1972) (Shapiro, J. dissenting), aff'd., 32 *N. Y.* 2d 862, 346 *N. Y. S.* 2d 529, 299 N. E. 2d 895 (Ct. App. 1973).

other than uniformed personnel. In reversing, the Circuit Court of Appeals refused to extend to the uniformed civilian service of the police department the "unique judicial deference" accorded to the military. After concluding that the characterization of the police service as a para-military organization is "hardly justified either historically or functionally,"[3] the court proceeded to pose the constitutional question as follows:

> While it has been argued that hair length controversies are much ado about nothing, we think there is a substantial constitutional issue raised by regulation of the plaintiff's hair length. The question is whether the government may interfere with the physical integrity of the individual and require compliance with its standard of personal appearance without demonstrating some legitimate state interest reasonably requiring such restriction on the individual. [483 *F.* 2d at 1130].

3. The analysis is this: The civilian police force, of recent development, grew from a need to supplement the private citizen's role in keeping the peace. The efficient conduct of its affairs called for an organization with centralized administration and disciplined rank and file, which were practical administrative solutions rather than steps towards creating a military force. The discipline essential to an effective police force is of a clearly different type from that required in the military.

> Instant unquestioning obedience has been found essential to a soldier in action and his training and its attendant discipline is designed to develop such obedience. The same type of instant unquestioning obedience is not necessary for an effective police force. Rather it has been suggested that the military model of organization and discipline must not be followed too closely as a policeman unlike a soldier frequently acts individually on his own initiative and not subject to the immediate supervision of his superiors. [*Dwen v. Barry, supra,* at 1129. Citations and footnotes omitted].

Here the only reason offered for the special order is a need for the Department to maintain its uniformed identity or, as expressed by one witness, "to achieve uniformity of appearance;"[4] but nowhere is the need for such uniformity of hair style justified by reference to a legitimate state interest reasonably related to the regulation. I would have no difficulty at all were the order demonstrably supported by safety concerns, see *Manco v. Town of Irvington,* 126 *N. J. Super.* 148 (App. Div. 1973), aff'd o. b. 64 *N. J.* 142 (1974), or by substantial considerations of discipline or efficiency. There may, to be sure, be other legitimate state interests. But from this record I cannot determine any relationship between so-called "uniformity of appearance" and any of these interests, no evidence having been submitted in support thereof.

What the record does disclose is a stipulation from the Police Director of the City of Newark that plaintiff Akridge's performance as a policeman was not in any way affected by his personal appearance which was concededly in violation of the order. The trial judge noted in his opinion that "the growth of hair on [Akridge's] face is not

4. Contrary to this assertion the regulation does not, of course, undertake to bring about uniformity or "sameness" of appearance. Rather, it sets outer limits for hair length, with certain adornments, *i.e.*, beards, goatees, "duck tails," absolutely prohibited.

Presumably the only way to achieve identity of appearance would be by way of a requirement that the head be shaved clean, in deference to those whom nature has denied a natural or unlimited growth, or by the less drastic alternative that those deprived of hairgrowing powers wear the same style wig, fashioned to some length to which the wigless would likewise be obliged to adhere

And while none of the briefs or opinions herein adverts to the problem, there lurks in the offing an equal protection argument when a hair length regulation is sought to be applied, or a waiver therefrom is granted, to one of the growing numbers of female police officers. See *Crews v. Cloncs,* 432 *F.* 2d 1259, 1266 (7 Cir. 1970).

in conflict with the order in any extreme or startling way. I have seen him in court and on those occasions he gave the impression of being well-groomed." 118 *N. J. Super.* at 561. While the hearing officer and the trial court surely were not bound by it, there was uncontradicted testimony at the administrative hearing, given by two fellow police officers whose credibility was unchallenged, that Akridge was aided by his appearance in his performance of his duties as a policeman in the South District; and Akridge said he felt his appearance helped him "to relate with the people that I'm serving * * *."

While plaintiffs' Verified Complaint is couched in "equal protection" terms,[5] it does charge that the regulation is "arbitrary" and has "no relation to [Akridge's] obligation and duties or performance as a police officer." The allegations are thus sufficient to project a substantive due process issue, which in my view is the ground on which the case turns.[6]

5. Paragraph 6 of the Verified Complaint reads as follows:

The requirements of Order 71-15 on their face discriminate against plaintiff DEREK THOMAS AKRIDGE and black members of the police department since the prohibition against bushy hair and mustaches are [*sic*] obviously designed to restrict black policemen while the white policemen would seldom, if ever, be charged with having bushy hair. And further, the hair style now predominant in the black community is natural or bushy in appearance whether it appears on the face or on the head. So black police officers are restricted in a way white officers are not.

6. Again from *Dwen:*

We may well base the right on the guarantee under the Due Process Clause of personal liberty of "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints. * * *" Poe v. Ullman, 367 U. S. 497, 543, 81 S. Ct. 1752, 1777, 6 L. E. 2d 989 (1961) (Harlan, J. dissenting). *Cf. Roe v. Wade,* 410 U. S. 113, 93 S. Ct. 705, 726, 35 L. Ed. 2d 147 (1973); Rochin v. California, 342 U. S.

(Footnote continued on next page)

On the record before us the regulation has not been justified. It is not defective or void on its face, but in any future contest as to its validity I would require defendants to sustain the burden of establishing a genuine public need for the Special Order. The order imposing a fine on plaintiff Akridge should be vacated.

> I suppose that a nation bent on turning out robots might insist that every male have a crew cut and every female wear pigtails. But the ideas of "life, liberty, and the pursuit of happiness," expressed in the Declaration of Independence, later found specific definition in the Constitution itself, including of course freedom of expression and a wide zone of privacy.
>
> I had supposed those guarantees permitted idiosyncracies to flourish, especially when they concern the image of one's personality and his philosophy towards government and his fellow men. [*Ferrell v. Dallas Independent School District,* 393 *U. S.* 856, 89 S. Ct. 98, 21 *L. Ed.* 2d 125 (1968) (Douglas, J. dissenting from denial of *certiorari.*)].

I would reverse.

For affirmance—Chief Justice HUGHES and Justices HALL, MOUNTAIN and SULLIVAN—4.

For reversal—Justices PASHMAN and CLIFFORD—2.

(Footnote continued from previous page)

165, 72 S. Ct. 205, 96 L. Ed. 183 (1952). Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary government interference. Limitation of such a right requires some showing of public need. [483 *F.* 2d at 1130].

APPENDIX B

Opinion and Judgment of the Appellate Division of the Superior Court of New Jersey

DEREK THOMAS AKRIDGE AND THE BRONZE SHIELDS, INC., A CORPORATION OF THE STATE OF NEW JERSEY, PLAINTIFFS-APPELLANTS, v. ANTHONY BARRES, CHIEF OF POLICE, AND THE CITY OF NEWARK, DEFENDANTS-RESPONDENTS.

SUPERIOR COURT OF NEW JERSEY

APPELATE DIVISION

Submitted January 22, 1973—Decided February 23, 1973

Before Judges LORA, ALLCORN and CRANE

PER CURIAM. It is no longer open to question that the members of a police department "in many respects constitute a military organization," 16 McQuillin, *Municipal Corporations* (3rd Ed., 1972 rev'd vol.), § 45.16, p. 621, and as such are necessarily subject to reasonable regulations having to do with discipline and morale. *Ward v. Keenan*, 3 *N.J.* 298 (1949); *Rivell v. Civil Service Commission*, 115 *N.J. Super.* 64 (App. Div. 1971), certif. den. 59 *N.J.* 269 (1971); *Newark v. Massey*, 93 *N.J. Super.* 317 (App. Div. 1967); *N.J.S.A.* 40A:14-118.

The police department has a proper and legitimate interest in the appearance of its members, including the length and style of head and facial hair. *Cf. Anderson v. Laird*, 437 *F.* 2d 912, 915 (C.A. 7, 1971), *cert. den.* 404 *U.S.* 865 (1971). Contrary to plaintiff's contention, such a regulation does not offend any First Amendment rights of

the members of the police department. As was stated in *Richards v. Thurston*, 424 *F.* 2d 1281, 1283 (C.A. 1, 1971), in disposing of a similar contention with regard to a dispute concerning the hair length of a public school student:

> * * * We recognize that there may be an element of expression and speech involved in one's choice of hair length and style, if only the disdain for conventionality. However, we reject the notion that plaintiff's hair length is of a sufficiently communicative character to warrant the protection of the First Amendment. That protection extends to a broad panoply of methods of expression, but as the nonverbal message becomes less distinct, the justification for the substantial protections of the First Amendment becomes more remote. * * * [citations omitted].

See, United States v. O'Brien, 391 *U.S.* 367, 376 (1968), reh. den. 393 *U.S.* 900 (1968); *Raderman v. Kaine*, 411 *F.* 2d 1102 (C.A. 2, 1969), *cert.* dismissed 396 *U.S.* 976 (1969). *See generally, Olff v. East Side Union High School District*, 404 *U.S.* 1042, 92 S. Ct. 703, 30 L. Ed. 2d 736 (1971; Comment, 84 *Harv. L. Rev.* 1702 (1971). *Compare, Friedman v. Froehlke*, 470 *F.* 2d 1351 (1 Cir. 1972).

Affirmed.

APPENDIX C

Opinion and Judgment of the Chancery Division of the Superior Court of New Jersey

DEREK THOMAS AKRIDGE AND THE BRONZE SHIELDS, INC., A CORPORATION OF THE STATE OF NEW JERSEY, PLAINTIFFS-APPELLANTS, v. ANTHONY BARRES, CHIEF OF POLICE, AND THE CITY OF NEWARK, DEFENDANTS-RESPONDENTS.

SUPERIOR COURT OF NEW JERSEY

CHANCERY DIVISION

Decided March 29, 1972.

HERBERT, J.S.C.

Plaintiff Akridge is a Newark policeman. He challenges the validity of Special Order No. 71-15 which was issued by the defendant Chief of Police on March 23, 1971 and which purports to set standards of appearance for policemen by regulating hair styles on head and face. According to the complaint, The Bronze Shields, Inc. has joined as a plaintiff on behalf of policemen who are its members, but the only specific grievance alleged is the impact of the Order upon Mr. Akridge. Special Order No. 71-15 is as follows:

"POLICE DEPARTMENT
NEWARK, NEW JERSEY

PUB 3-1
March 23, 1971

"SPECIAL ORDER FROM THE CHIEF OF POLICE
NO. 71-15

To: All Commands

From: Chief of Police

Subject: Standards of Appearance—Hair Style—Facial Hair Growths

C-2

Opinion and Judgment of Chancery Division of the Superior Court of New Jersey

1. *Purpose*

The purpose of this order is to set standards of appearance for hair styles and facial hair growths worn by Police Officers. The tolerances set forth represent a reconciliation between the current acceptance of fuller and longer male hair styling and the need for establishing clearly defined limits within which our Department can maintain its uniformed identity.

2. *Requirement*

The standards as defined are a compilation of recommendations made by Divisional Commanders after consultation with subordinates at all functional levels. The tenets of this order are binding on all Police Officers except when their assignments or duties permit a departure from the requirements. However, any departure must be approved by the Divisional Commander.

3. *Standards*

Effective this date, all male Police Officers shall regulate their hair style and facial hair growths to conform with the standards for on duty appearance as listed in this section.

a. *Hair*

(1) The style shall be of medium length and fullness.

(2) The duck tail length is prohibited.

(3) Bushy hair protruding from the sides or back of the head, when a hat is worn, is prohibited.

(4) A neat pattern on the rear of the neck shall be maintained. The growth must be neatly trimmed near the collar line and shall not extend over a shirt or coat collar.

b. *Sideburns*

(1) The length shall not extend beyond the tip of the ear lobe.

(2) The width shall not exceed 1 1/4-inch at the broadest point.

(3) The growth shall not be more than 1/4-inch in depth.

c. *Mustache*

(1) The pattern shall be neatly trimmed.

(2) The extent of growth shall be limited to 1/2-inch below the line of the corner of the mouth.

(3) The thickness shall be 1/4-inch in depth and not appear bushy.

(4) The ends may not be waxed or twisted.

d. *Full Beards—Goatees*

Full beards, goatees or other growths of hair below the lower lip, on the chin, or lower jaw bone area are prohibited.

e. *Clean Shaven*

Except for the areas of facial growth permitted by this order, all members shall be clean shaven.

4. *Rules and Regulations*

This order supplements the Rules and Regulations concerned with members' personal appearance. Any conflict shall be resolved in favor of the standards set by this order.

/s/ ANTHONY BARRES
CHIEF OF POLICE

AB:TWM:jh"

The order was issued after a series of meetings at which its subject matter was discussed. Plaintiff Akridge participated in some of the discussions. The contract of January 1, 1971 making Local No. 3 of the Patrolmen's Benevolent Association the exclusive representative of all patrolmen for collective negotiations requires an opportunity for discussion before rules and regulations are put into effect, and the meetings in question were obviously held to comply with that requirement. The question of new regulations came up because a number of men were complaining that the existing (and stricter) rules were not suitable for the times.

The complaint in the present case was filed on April 27, 1971. It alleged that plaintiff Akridge had been advised he would be suspended on that date unless he had his hair trimmed to comply with the Order. Preliminary relief was applied for but was denied on the ground that Patrolman

Akridge should exhaust his administrative remedies before suing for an injunction. On May 10, 1971 Patrolman Akridge was given a hearing before the Police Director on the charges which had been filed against him. Those charges go into considerable detail, but can be described in a general way as alleging the following conflicts with Special Order No. 71-15: Akridge has sideburns which are too long, too wide and too bushy; has a mustache which extends more than 1/2" below the corners of his mouth; has a goatee; and has refused to obey commands that he bring his appearance into conformity with the provisions of Special Order No. 71-15. The result of the hearing before the Police Director was a finding that Patrolman Akridge was guilty of the charges made against him. He was fined five days' pay and given the option of working off the fine.

Since the adverse decision of the Police Director plaintiffs' application for injunctive relief has been renewed. It has been agreed by counsel that the pleadings and affidavits filed in this case together with the transcript of the hearing before the Police Director shall be considered as the full record, thus making it possible to treat the case as a summary proceeding under Rule 4:67, and reach a final decision.

For defendant it is argued that administrative remedies have not been completely exhausted. By way of answer to that, plaintiffs point to *N. J. S. A.* 11:2A-1, which by implication rules out Civil Service Commission review of penalties of five days or less. They also cite *Perrapato v. Rose*, 83 N. J. Super. 245 (App. Div. 1964) in which it was held that a policeman who had been suspended for five days was

entitled to have the legality of the suspension reviewed by the courts without first going to the Civil Service Commission. By proceedings in lieu of prerogative writ he succeeded in having the suspension held unlawful and set aside. It appears that the present case might have been brought in the Law Division as a proceeding in lieu of prerogative writ. However, no motion for transfer has been made and it will be economical of time and effort to decide it here.

Mr. Akridge has not complied with Special Order No. 71-15; that is conceded. It may be added that the growth of hair on his face is not in conflict with the Order in any extreme or startling way. I have seen him in court and on those occasions he gave the impression of being well groomed.

There have been many cases dealing with orders and regulations to limit hair styles of schoolboys. A note in 84 *Harvard L. Rev.* 1702 (May, 1971) collects and discusses at some length cases of this type. More recently the United States Supreme Court, without any opinion by the majority, denied *certiorari* in a case from the Ninth Circuit holding a school's regulations concerning length of hair to be enforceable. Mr. Justice Douglas voted to allow the writ and filed a dissenting opinion. *Olff v. East Side Union High School District,* 30 L. Ed. 2d 736 (January 17, 1972). In the footnotes to that opinion a great many cases are collected and it is pointed out that in a total of over fifty reported cases which squarely presented the issue the student has won about half. One case listed by Justice Douglas is especially interesting because of its age: *Ho Ah Kow v. Nunan,* 12 Fed. Cas. 252 (C. C. D. Cal. 1879). There an

alien Chinese was awarded damages against the Sheriff of San Francisco County under the Civil Rights Act because his queue had been cut off when he commenced serving a five-day jail sentence for a petty offense.

The cited note in the Harvard Law Review points out that courts have had some difficulty in determining what constitutional rights are involved in this area. By way of conclusion, the note writer comments (84 Harvard L. Rev. at 1712):

> "In short, whether one proceeds under a first amendment theory or under the more basic principle of a right to determine personal appearance, it would seem that some room for personal choice in this area is dictated by the Constitution. The fact that a right to grow long hair does not rest comfortably in any niche of the Bill of Rights does not mean that *any* state regulation of student appearance should pass muster."

During the course of the testimony which he gave at the disciplinary hearing before the Police Director, Mr. Akridge, having been asked about his reasons for having hair on his face in patterns which conflict with Special Order No. 71-15, said this:

> "I think that I'm expressing my individual pride as a black man and also it helps me to relate with the people that I'm serving, I mean it is a definite fact since this trouble has come to the notice of the public, it is a definite fact since I've been in that patrol car I've received more support and solid back-

> ing from the community to stand on this issue and I've received a lot of support to continue to be a good policeman and I think this issue has proven without the shadow of a doubt in my mind that the community I serve wants me to identify with them as one and this is my inspiration for this whole trial, this whole issue is inspired by the fact that the people want me, as a black policeman, to identify as their fellow man and their fellow brother and I think this is what police work is all about."

Decisions on the regulating of students' hair, although interesting, really have no application here. Discipline, to a degree unknown in schools, is a generally accepted characteristic of a competent municipal police force. *McQuillin, Municipal Corporations,* (3rd Ed., Revised 1963), § 45.16, page 675 says:

> "Members of a police force and its responsible officers in many respects constitute a military organization. Discipline must be enforced, and members of the force must surrender individual powers and freedom of action in favor of undivided allegiance to their public duty. As has been seen, reasonable rules and regulations for the government and discipline of the police force may be promulgated and are binding on members of the department."

§ 45.16 of *McQuillin* was cited with approval in *City of Newark v. Massey,* 93 N. J. Super. 317, 323 (App. Div. 1967).

Opinion and Judgment of Chancery Division of the Superior Court of New Jersey

No reported case has been found in which the growth of hair on the head or face of a policeman was at issue. However, a rule restricting a policeman's freedom to speak has been upheld and enforced. *McAuliffe v. Mayor, etc. of City of New Bedford,* 155 Mass. 216; 29 N. E. 517 (1892). In that case a policeman violated a rule of his department by soliciting money to be used for political purposes and by becoming a member of a political committee. Because of the violations he was removed from office. In his suit for reinstatement he argued among other things that the rule he had violated was invalid because it invaded his right to express his political opinions. Concerning the claimed invasion of rights, Justice Holmes said for the court (29 N. E. 517):

> "One answer to this argument, assuming that the statute does not make the mayor the final judge of what cause is sufficient, and that we have a right to consider it [citations], is that there is nothing in the constitution or the statute to prevent the city from attaching obedience to this rule as a condition to the office of policeman, and making it part of the good conduct required. The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman. There are few employments for hire in which the servant does not agree to suspend his constitutional rights of free speech as well as of idleness by the implied terms of his contract. The servant cannot complain, as he takes the employment on the terms which are offered him. On the same principle the city may impose

> any reasonable condition upon holding offices within its control. This condition seems to us reasonable, if that be a question open to revision here."

I can find no basis at all in our statutes or in the reported cases for holding that the city's powers to create and maintain a uniformed police force cannot include the power to regulate the appearance of its policemen by writing rules about their hair. If bizarre styles should be ordered, then presumably the order would be subject to question as an arbitrary action, but we have nothing of the sort here. Special Order No. 71-15 on its face appears reasonable, and more importantly in a legal sense, appears to lie well within the scope of the responsibilities given to those charged with running the Newark Police Department. It is no more for a court, than it is for Mr. Akridge, to say that the Order should allow sideburns to be a little thicker or mustaches a little longer.

Final judgment will be entered in favor of defendant.

APPENDIX D

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT IX

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LIBRARY

In the

Supreme Court of the United States

October Term, 19[illegible]

No. 74-[illegible]

DEREK THOMAS AKRIDGE,

Petitioner,

vs.

ANTHONY BARBER, Chief of Police and
THE CITY OF NEWARK,

Respondents.

On Petition for a Writ of Certiorari to the
Supreme Court of New Jersey

BRIEF IN OPPOSITION

Marion A. Bror,
Corporation Counsel,
The City of Newark,
Attorney for Respondents,
City Hall,
Newark, New Jersey, 07102.

Matthew J. Sooka,
Assistant Corporation Counsel,
On the Brief.

Adams Press Corp., 31 Commerce Street, Newark, N. J.—Market [illegible]

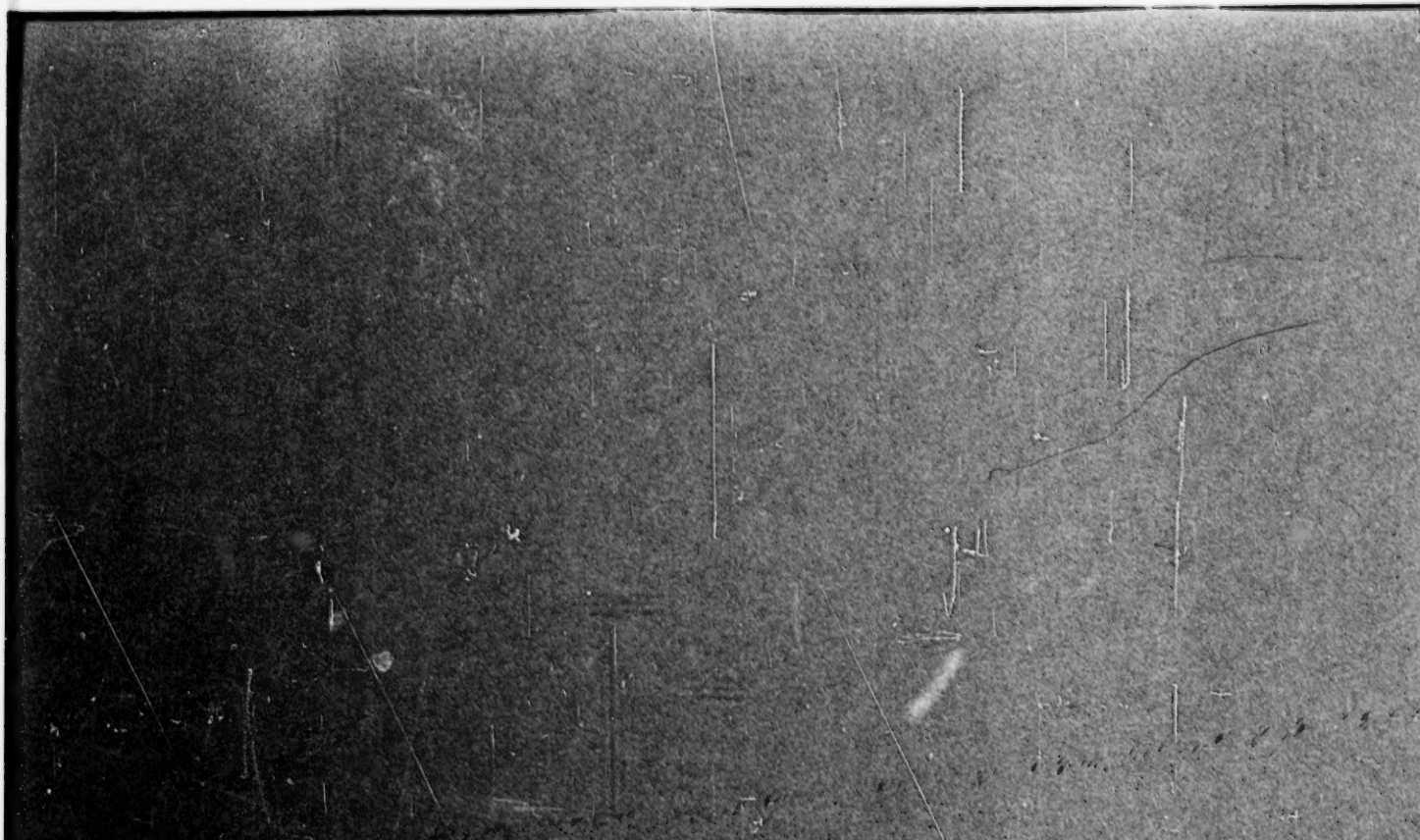


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IN THE

Supreme Court of the United States

OCTOBER TERM OF 1974

No. 74-338

DEREK THOMAS AKRIDGE,

Petitioner,

vs.

ANTHONY BARRES, Chief of Police and
THE CITY OF NEWARK,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

Opinions Below

The opinion of the Supreme Court of the State of New Jersey is reported at 65 N. J. 266 and 321 A. 2d 230 (1974).

The opinion of the Appellate Division of the Superior Court of the State of New Jersey is reported at 122 N. J. Super. 476 (App. Div. 1973) and 300 A. 2d 866.

The opinion of the Chancery Division of the Superior Court of New Jersey is reported at 118 N. J. 557 Super. (Ch. Div. 1972) and 289 A. 2d 270.

Jurisdiction

The jurisdiction of this Court is contained in 28 U.S.C. § 1257 (3) and 28 U.S.C. 2101(c).

Statement of Questions Presented

Whether Special Order No. 71-15 of the Newark, New Jersey, Police Department which sets standards of hair style and facial growth for Newark police officers constitutes an unconstitutional infringement of a police officer's rights under the First Amendment of the Constitution.

Whether Special Order No. 71-15 constitutes a reasonable regulation of any rights a police officer may have under the First Amendment and Due Process Clause of the Fourteenth Amendment.

Statement of the Case

On March 23, 1971, the Newark, New Jersey, Police Department promulgated Special Order No. 71-15 which purported to set standards of appearances for hair styles and facial hair growths for members of the Newark Police Departemnt. The full text of Special Order No. 71-15 is found in Petitioner's Appendix C.

Petitioner, a black member of the Newark Police Department, refused to wear his hair and facial growth in compliance with Special Order No. 71-15. Departmental charges were brought against petitioner and after a hearing before the Police Director was found guilty of violating Special Order No. 71-15. He received a fine of five days pay.

Petitioner then challenged the constitutionality of Special Order No. 71-15 in the Chancery Division of the Superior Court of New Jersey. That Court on March 29, 1972, rejected the challenge holding that Special Order No. 71-15 was "reasonable, and more importantly in a legal sense, appears to lie well within the scope of the responsibilities given to those charged with running the Newark Police Department" (Petitioner's Appendix C).

Petitioner then appealed to the Appellate Division of the Superior Court of New Jersey. After briefs and oral argument, the Appellate Division affirmed the Chancery Division and rejected the argument that petitioner's First Amendment rights were infringed upon. (Petitioner's Appendix B).

Certification was then granted to the Supreme Court of New Jersey and on June 26, 1974, the opinion of the Appellate Division was affirmed *per curiam*. Two justices dissented. (Petitioner's Appendix A).

This petition followed.

REASONS FOR DENYING WRIT

1. Special Order No. 71-15 does not violate any of petitioner's First Amendment rights.

Petitioner argues that Special Order No. 71-15 is an unconstitutional restriction of his right of "free speech" in that the way he wears his hair and facial growth is expressive in nature. He theorizes, but has never demonstrated, that his hair and style and facial growth positively assists him in working with Newark's black community (TR49-51 of hearing before Police Director).

Respondents respectfully submits that the trend of the cases is against petitioner's position. In *United States* v. *O'Brien,* 39 U.S. 367, 20 L. Ed. 2d 672, 88 S. Ct. 1673 (1968), appellant was convicted of burning his draft card. One of his grounds for challenging the appropriate federal statute was that his act of burning his draft card was "symbolic speech" protected by the First Amendment because it constituted a demonstration against the Vietnam War and the draft system. This Court rejected that idea stating:

> "We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." 30 L. Ed. 2d at p. 679.

The subject of hair length has been at issue in several cases around the nation. A leading case is *Olff* v. *East Side Union High School District,* 404 U.S. 1042, 30 L. Ed. 2d 736, 92 S. Ct. 7703 (1972), cited as *King* v. *Saddleback Junior College District,* 445 F. 2d 932 (9th Cir. 1971). These school dress codes setting length of hair limitations

were challenged on First Amendment grounds. The Court of Appeals rejected this argument explaining:

> "In the cases before us, *neither of the regulations* on its face indicates a conflict with freedom of speech. There was no evidence that either regulation was enacted by the respective school authorities with such a purpose in mind."
>
> • • •
>
> ". . . On the contrary, a male student could express his personality by means of his hair at any length, between a short hair cut and a long one limited only so that the hair did not fall below the collar in back." 445 F. 2d at p. 937.

In *Richards* v. *Thurston*, 424 F. 2d 1281 (1st Cir. 1970) (collecting cases) hair length and style was found to be without the scope of the First Amendment. The Court exclaimed:

> ". . . We recognize that there may be an element of expression and speech involved in one's choice of hair length and style, if only the expression of disdain for conventionality. However, we reject the notion that plaintiff's hair length is of a sufficiently communicative character to warrant the full protection of the First Amendment. • • • That protection extends to a broad panoply of methods of expression, but as the van-verbal message becomes less distinct, the justification for the substantial protection of the First Amendment becomes more remote." 424 F. 2d at p. 1283.

Respondents respectfully submit that hair length and facial growth regulations are not within the scope of the First Amendment and that the matter has been settled by

the cases in the area. Petitioner has never demonstrated that the length of his hair or his mustache was in any way communication. Nor did he ever contend that the length of his hair was in any sense a protest. See, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969).

2. Special Order No. 71-15 constitutes a legitimate and reasonable regulation of a police officer's personal appearance.

A police department is a *quasi* military organization whose members are subject to reasonable regulations dealing with discipline and morals *Ward* v. *Kennan*, 3 N.J. 298 (1949); *City of Newark* v. *Massey*, 93 N.J. Super. 317 (App. Div. 1967); 16 McQuillin, *Municipal Corporations* (3rd Ed., 1972 rev'd vol.), Sec. 45, 16, p. 621.

In *Stradley* v. *Andersen*, 478 F. 2d 188 (8th Cir. 1973) a police officer challenged a departmental order setting standards of hair style and facial growth for police officers. The order was challenged on constitutional grounds. The Court rejected arguments that hair styles are within the scope of the First Amendment and the Due Process Clause of the Fourteenth Amendment. The Court stated:

> "Traditionally, the policeman has been a highly trained officer who is entrusted with a responsible and often-times dangerous role as a public servant. His work habits on active duty require disciplined conduct, regimentation, and frequent strict adherence to regulation and authorized detail. His job is often a delicate and difficult to lawfully act against those who are sometimes unwilling to recognize any rules or ethics. It is essential that a policeman's training be such that he be taught to obey

> strict disciplinary procedure and rules in order to lend practical assurance that he will follow command and not abuse his awesome authority. As part of this discipline, the Police Department has determined that an officer shall be neat in his appearance. There can be little argument that this requirement constitutes a legitimate departmental interest." Id. at p. 190.
>
> "We reject the idea that community standards provide a legtimate basis in weighing constitutional rights guaranteed to the individual. Whether public acceptance or rejection of a particular hair style exists in one community or another should not be a standard concern to a Federal Court." *Id.* at p. 190
>
> • • •
>
> "One may argue that how one wears his hair has little to do with whether an officer might affectively apprehend criminals or otherwise fulfill his assigned mission as a policeman. This misses the work. The critical factor is that police officialdom deems it necessary that the officer be well disciplined and that as part of that internal discipline, he be required to maintain a neat appearance. The degree of that appearance, as long as it is not arbitrary or unreasonable, should not be the Court's concern." *Id.* at pp. 190-191

Similar reasoning was applied in *Owen* v. *Barry,* 336 F. Supp. 487 (E. D. N. Y. 1971). There the Court, in reviewing a dress code for policeman said:

> ". . . How the police officer appears to the public is one factor in effective law enforcement. . . . It would be inappropriate for the court to frame such regulations, absent a clear showing of a violation of a constitutional right." *Id.* at pp. 487-488

Regulation by the public of non speech elements of freedom of expression was officially sanctioned in *United States* v. *O'Brien, supra.* Their draft card burning was held to be a form of expression which could be restricted if there was a legitimate governmental interest to foster. 20 L. Ed. 2d at p. 680. See, also, *Anderson* v. *Laird,* 437 F. 2d 912 (7th Cir. 1971) (hair regulations for National Guard member); *King* v. *Saddleback Junior College District,* supra.

Petitioner relies heavily on *Pickering* v. *Board of Education,* 39 U. S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). However, that case involved actual speech on the part of a public official and not the so called "symbolic speech" at issue in the present case. Moreover, it is submitted, the "balancing test" set forth in *Pickering* must lead to a different conclusion where a police officer is involved. Cf., *Muller* v. *Conlisk,* 429 F. 2d 901 (7 Cir. 1970).

CONCLUSION

For the reasons stated, respondent respectfully submits that this petition for writ of certiorari be denied.

Respectfully submitted,

MILTON A. BUCK
Corporation Counsel
The City of Newark
By MATTHEW J. SCOLA
Assistant Corporation Counsel

Certificate of Service

I, Matthew J. Scola, attorney for Respondents, Anthony Barres, Chief of Police and The City of Newark, do hereby certify that I did send three copies of the foregoing Brief on the following:

GARRETT M. HEHER, ESQ.
One Palmer Square
P. O. Box 1154
Princeton, New Jersey 08540

Attorney of record for Petitioner, by mailing the same to him by regular mail.

MATTHEW J. SCOLA
Assistant Corporation Counsel